Supreme Court, U.S.
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No. 00-194

In the Supreme Court of the United States

FIDELMAR OROZCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court complied with Federal Rule of Criminal Procedure 32(c)(1) when it relied on the presentence investigation report in making its factual findings regarding the amount of drugs attributable to petitioner and petitioner's role in the offense.

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 213 F.3d 638 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2000. The petition for a writ of certiorari was filed on July 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess heroin

with intent to distribute it, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(b)(1); and two counts of aiding and abetting the distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to 262 months' imprisonment, to be followed by ten years' supervised release. The court of appeals affirmed. Pet. App. 1-2, 5.

1. Petitioner was the leader of a drug trafficking organization that distributed black tar heroin in Texas and Chicago, Illinois. Presentence Investigation Report (PSR) ¶ 4. Beginning in December 1994, the Houston High Intensity Drug Trafficking Task Force used several confidential informants to infiltrate petitioner's organization. Thereafter, petitioner and his confederates engaged in numerous drug transactions involving informants. *Ibid.*

a. On December 13, 1994, an informant introduced an undercover officer to petitioner and his brother to negotiate the purchase of black tar heroin. That same day, petitioner delivered 48.8 grams of black tar heroin in exchange for $4400. PSR ¶ 7. Between January 10 and 21, 1995, petitioner negotiated for the sale of 178.8 grams of black tar heroin in a transaction that was ultimately consummated in Chicago, Illinois. *Id.* ¶¶ 8-9. On March 22, 1995, petitioner and another man sold a confidential informant 1.7 grams of black tar heroin for $250. *Id.* ¶ 11. In negotiations culminating on March 25, 1995, petitioner and another man caused 49.7 grams of black tar heroin to be distributed to a confidential informant in exchange for $5000. *Id.* ¶ 12. Between June 23 and July 6, 1995, petitioner and another accomplice negotiated the delivery of 100 grams of black tar heroin in exchange for $8000. *Id.* ¶¶ 18, 20.

b. Petitioner's organization also distributed other drugs, including methamphetamine and cocaine. PSR

¶ 4. During the latter part of March 1995, petitioner contacted a confidential informant about purchasing a vehicle capable of transporting 50 kilograms of cocaine from Brownsville, Texas to Dallas, Texas. On April 1, 1995, petitioner and another man met with the informant to obtain the car. During that meeting, petitioner disclosed that two men had arrived in Houston from California with six pounds of methamphetamine. *Id.* ¶ 13. On April 4, 1995, agents observed petitioner and another man meet in a Dallas motel with Rogelio Alvarez, who had arrived from California to oversee the distribution of methamphetamine. Petitioner and the other man then went to the residence of David Gaona, also in Dallas. *Id.* ¶ 14.

Shortly thereafter (on April 19, 1995), a confidential informant told government agents that an additional six pounds of methamphetamine had been delivered to petitioner in Dallas. PSR ¶ 14. According to the informant, petitioner had stated that he had paid $8000 per pound for the methamphetamine, but was selling it for $9000 a pound, and that Alvarez was the source of all 12 pounds. Petitioner had asked the informant to help him sell two pounds. *Ibid.* A confidential informant, on April 21, 1995, spoke with petitioner by phone and agreed to purchase one pound of methamphetamine. Petitioner then called David Gaona at his Dallas residence, and Gaona later met with the informant and an undercover agent outside a restaurant to complete the sale. The methamphetamine delivered by Gaona weighed 411.48 grams. *Id.* ¶ 15. At a meeting on May 3, 1995, petitioner was paid $4000 for those drugs and received a $5000 credit toward the car purchase, for a total price of $9000. *Id.* ¶ 16.

On May 8, 1995, a confidential informant told government agents that petitioner owed $38,000 to the Mexi-

can source of the 12 pounds of methamphetamine. The informant also disclosed that the methamphetamine was transported from San Jose, California, between April 1 and April 19, 1995, and that Alvarez was the person responsible for distributing it. The informant reported that petitioner had told him that he was expecting another 12-pound shipment of methamphetamine by the end of the week. PSR ¶ 17.

c. Finally, on April 14, 1997, Drug Enforcement Administration agents observed petitioner retrieve a box from a residence and then depart in a Ford Explorer. Agents following petitioner lost sight of the Explorer, but noticed the box sitting on a curb. They retrieved the box, which contained 2.2 kilograms of methamphetamine. Petitioner's vehicle was stopped and all of its occupants admitted that petitioner had picked up a box and then entered the vehicle. Although they denied that petitioner had placed the box on the curb, they could not explain what had happened to the box after petitioner entered the Explorer. PSR ¶¶ 25, 26.

2. On December 20, 1995, a grand jury sitting in the Houston Division of the Southern District of Texas issued a 13-count indictment charging petitioner and 16 others with various drug offenses. Petitioner was charged with conspiracy to possess heroin and methamphetamine with intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(A)(i) and (viii) (Count One); and two counts of aiding and abetting a distribution of heroin, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(C) and 18 U.S.C. 2 (Counts Two and Three). On December 15, 1997, petitioner pleaded guilty to all counts. Gov't C.A. Br. 2-3.

a. A PSR prepared by the Probation Office attributed 379 grams of heroin and 8011.48 grams of methamphetamine to petitioner for sentencing pur-

poses. PSR ¶ 27. The methamphetamine consisted of the six pounds petitioner received on or about April 1, 1995, the six pounds he received on or about April 19, 1995, the one pound he distributed on April 21, 1995, and the 2.2 kilograms he abandoned on April 14, 1997. See pp. 3-4, *supra*. Under the applicable guidelines, the 379 grams of heroin and 8011 grams of methamphetamine were equivalent to 8390.48 kilograms of marijuana, giving petitioner a base offense level of 34. *Id.* ¶¶ 27, 33.[1] The Probation Office also recommended that petitioner receive a three-level upward adjustment for his role as a "manager/supervisor" in the offense. *Id.* ¶ 27, 36. Because petitioner had three prior drug convictions, petitioner was placed in criminal history category IV. *Id.* ¶¶ 43-47.[2]

b. Petitioner filed written objections to the PSR, challenging the Probation Office's calculation of the quantity of methamphetamine he distributed. In particular, petitioner challenged the confidential informant's report that he had received six pounds of metham-

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[1] The Probation Office used the 1995 version of the Sentencing Guidelines, which equated one gram of methamphetamine or heroin with one kilogram of marijuana. Sentencing Guidelines § 2D1.1, comment. (n.10) (1995). Those Guidelines assigned a base offense level of 34 to any quantity of marijuana between 3000 kilograms and 9999 kilograms. Sentencing Guidelines § 2D1.1(c)(3).

[2] Under 21 U.S.C. 841(b)(1)(A), any person who commits a violation of Section 846 involving 500 grams or more of methamphetamine and who has two or more prior felony drug convictions "shall be sentenced to a mandatory term of life imprisonment without release." In this case, however, the government's notice of prior convictions under 21 U.S.C. 851 inadvertently included only one of petitioner's convictions. 4/6/98 Sent. Tr. 5-6 ("[Petitioner] received a break because we didn't know about [the other prior convictions].").

phetamine on April 19, 1995, arguing that the informant's credibility was "suspect, at best" because his report was uncorroborated and was made on the same day petitioner allegedly received the drugs. See First Amended Objections to Presentence Investigation Report at 1 (Defendant's Objections). Petitioner also complained that the 2.2 kilograms left at the curb should not be attributed to him. *Id.* at 1-2. Finally, petitioner objected to the PSR's conclusion that he was a "manager/supervisor" of the drug trafficking conspiracy. In the alternative, petitioner argued that he should have received a two-level increase, rather than a three-level increase, because he was involved in a relatively small criminal enterprise. *Id.* at 2-3.

In a written addendum to the PSR, the probation officer declined to make any changes to the report. With respect to the six pounds of methamphetamine received on April 19, 1995, the addendum noted that the confidential informant had previously provided truthful and reliable information, and that this information was corroborated by the one-pound sale on April 21, 1995 for the same price that the informant reported that petitioner would charge. Second Addendum to Presentence Report at 1. As for the 2.2 kilograms of methamphetamine abandoned on April 14, 1997, the addendum concluded that it was reasonable to infer that petitioner placed it on the curb during the moment the agents lost sight of the Explorer. *Id.* at 2. Finally, the addendum noted that both electronic surveillance and statements from petitioner's co-conspirators supported the conclusion that petitioner "held decision making authority over other criminal participants." *Ibid.*

c. At a sentencing hearing held on April 6, 1999, the court overruled petitioner's objection to the quantity of

methamphetamine the PSR attributed to him, concluding that "the evidence of the operation supports the existence, not just of a hope of having the quantity of drugs that the Government talks about." 4/6/98 Sent. Tr. 2-3; see *id.* at 6 ("The five pounds in the box is perfectly attributable to him."). The court also concluded that petitioner had played an aggravated role in the offense, noting that he was "the most significant" participant of the 15 people indicted. *Id.* at 5. At the same time, the court granted petitioner a three-level downward adjustment for acceptance of responsibility, resulting in an offense level of 34 and a punishment range of 210 to 262 months. *Id.* at 12-13.

3. Petitioner appealed, arguing that the district court erred in relying at sentencing on disputed statements in the PSR. Pet. C.A. Br. 10. Once a defendant objects to a factual statement in the PSR, petitioner contended, the court can rely on that statement only if the prosecution offers evidence or testimony to support it. *Id.* at 13-14. While acknowledging that Fifth Circuit precedent foreclosed that claim, *id.* at 14-16 (citing *United States* v. *Reyna*, 130 F.3d 104, 112 (5th Cir. 1997)), petitioner indicated that he wished to preserve the issue for possible review by this Court. *Id.* at 16.

The court of appeals affirmed in an unpublished *per curiam* opinion. Pet. App. 1-2. The court noted that, under circuit precedent, "a defendant's failure to present any evidence in support of his objections means that the sentencing court is 'free to adopt [the PSR's] findings without further inquiry or explanation.' *United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995)." *Id.* at 2.

ARGUMENT

Petitioner contends (Pet. 7-12) that the district court erred in relying on the PSR at sentencing because the government did not offer any additional evidence after he objected to certain statements in the PSR. That claim does not warrant review by this Court.[3]

1. Petitioner appears to contend that the district court should have held an evidentiary hearing to resolve his objections to the PSR. Pet. i, 8 (faulting district court for not "requesting an evidentiary hearing"). This case, however, does not properly present that issue. Although petitioner did file written objections to certain conclusions in the PSR, he did not request an evidentiary hearing. Instead, petitioner merely challenged the weight or reliability of the infor-

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[3] Petitioner does not raise any claim under *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), nor does the sentence in this case involve any *Apprendi* error. Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363. The district court relied on 21 U.S.C. 841(b)(1)(A), which applies, *inter alia*, to offenses involving more than 500 grams of a mixture or substance containing methamphetamine and authorizes a sentence up to life imprisonment. Even without considering the quantity of drugs involved in his offense, however, petitioner was subject to a maximum sentence of 360 months' imprisonment. See 21 U.S.C. 841(b)(1)(C) (providing for a sentence of not more than 30 years' imprisonment for any offense involving a schedule I or II controlled substance, without regard to quantity, if the defendant "commits such a violation after a prior conviction for a felony drug offense has become final"). Here, the government gave proper notice that petitioner was subject to sentencing as a recidivist. See p. 5, note 2, *supra*. Petitioner's sentence of 262 months' imprisonment falls within the range authorized by Section 841(b)(1)(C).

mation cited by the probation officer and the propriety of relying on that information. Because such a challenge is not the equivalent of a request for an evidentiary hearing, the question of whether the court must hold such a hearing, if requested, is not presented here.[4]

2. Even if petitioner had requested an evidentiary hearing, his claim would not warrant further review. This Court recently declined to review substantively identical claims in *Sidney* v. *United States*, cert. denied, 121 S. Ct. 97 (2000) (No. 99-9585), and *Huerta* v. *United States*, cert. denied, 120 S. Ct. 1238 (2000) (No. 99-6807). There is no reason for a different result here.

a. Notwithstanding petitioner's contentions (Pet. 7, 11), neither the Federal Rules of Criminal Procedure nor the Sentencing Guidelines require the government to offer evidence beyond that provided by the PSR simply because a defendant objects to one or more of the PSR's findings. Federal Rule of Criminal Procedure 32(b)(6)(D) authorizes a district court to adopt the PSR's factual findings at sentencing "[e]xcept for any unresolved objection." For "each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." Fed. R. Crim. P. 32(c)(1). A "court may, *in its discretion*, permit the parties to introduce testimony or other evi-

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[4] A defendant who objects to findings in the PSR may not want to test those findings at an evidentiary hearing for fear that the evidence presented will support an increase in the applicable offense level. Accordingly, a defendant who fails to request an evidentiary hearing should not be allowed to claim on appeal that the district court should have held such a hearing *sua sponte*.

dence on the objections." *Ibid.* (emphasis added). The Sentencing Guidelines similarly provide that, when a defendant "reasonably * * * dispute[s]" any factor important to the sentencing determination, the district court must give the defendant an "adequate opportunity to present information to the court regarding that factor." Sentencing Guidelines § 6A1.3(a).

The district court complied with those requirements here. After reviewing the PSR and petitioner's objections, the court reasonably overruled those objections, finding that petitioner was responsible for the 8011.48 grams of methamphetamine, and that he was a leader of the conspiracy. 4/6/98 Sent. Tr. 2-3. Although petitioner objected to the sources of information relied upon by the PSR, none of his objections justified an evidentiary hearing (see pp. 13-16, *infra*), especially since petitioner neither presented nor offered to present contradictory evidence. Under those circumstances, the district court did not err in determining that the PSR, notwithstanding petitioner's objections, was sufficient to establish each of the relevant facts by a preponderance of the evidence.

b. Contrary to petitioner's contention (Pet. 9-11), there is no conflict between the decision below and that of other courts of appeals that warrants review in this case. Several courts of appeals, along with the Fifth Circuit, have held that a district court may rely on factual assertions in a PSR notwithstanding a defendant's objections if the defendant does not present contrary evidence. See, *e.g.*, *United States* v. *Taylor*, 72 F.3d 533, 547 (7th Cir. 1995); *United States* v. *Raven*, 39 F.3d 428, 434-435 (3d Cir. 1994); *United States* v. *Yates*, 22 F.3d 981, 989 (10th Cir. 1994); *United States* v. *Skrodzki*, 9 F.3d 198, 201-202 (1st Cir. 1993); *United States* v. *Terry*, 916 F.2d 157, 162 (4th Cir. 1990). Those

decisions follow from the understanding that the PSR, developed by an officer of the court after a thorough investigation, bears sufficient indicia of reliability that its findings cannot be overcome by a bare objection, unsubstantiated by any proffer of evidence. See *United States* v. *Coonce*, 961 F.2d 1268, 1278-1280 (7th Cir. 1992); see also Sentencing Guidelines § 6A1.1.

Although petitioner argues that other circuits have adopted a different approach, Pet. 9-11, petitioner often relies on cases in which the government was required to produce additional evidence only *after* the defendant had adduced sufficient evidence to support his objection to the PSR. For example, in *United States* v. *Greene*, 71 F.3d 232, 235 (6th Cir. 1995) (cited Pet. 9), the district court heard testimony "from the defendant himself" about the alleged inaccuracies in the PSR; in that case, moreover, the PSR's finding regarding an enhancement for risk of serious bodily injury was based on an FBI report the defendant was not permitted to review, depriving him of an adequate opportunity to respond. *Id.* at 236. Similarly, in *United States* v. *Bernardine*, 73 F.3d 1078, 1081 (11th Cir. 1996) (cited Pet. 9), the defendant "presented four witnesses at the sentencing hearing" in support of his objection to the PSR's finding that he was a "prohibited person" under Sentencing Guidelines § 2K2.1(a)(6).[5] In the face of the

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[5] In some of the cases petitioner cites, the issue petitioner seeks to raise here was never squarely addressed. See *United States* v. *O'Dell*, 965 F.2d 937, 938 (10th Cir. 1992); *United States* v. *Gessa*, 971 F.2d 1257, 1265 n.7 (6th Cir. 1992); *Dorman* v. *Higgins*, 821 F.2d 133, 138 (2d Cir. 1987). In *O'Dell*, the Tenth Circuit stated that contested facts in a PSR must be established by a preponderance of the evidence; because the defendant in that case did not object to the PSR, however, the court had no occasion to apply that principle. 965 F.2d at 938. Furthermore, in *Yates*, 22 F.3d at

defendants' evidence in those cases, the PSRs did not support the factual findings that were necessary to impose the enhancements.[6]

Petitioner's primary claim seems to be that the standard employed by the Fifth Circuit in this case conflicts with the approach of the Eighth Circuit. See Pet. 7, 9. The Eighth Circuit requires that a district court's findings at sentencing, if made over a defendant's objection, have record support. See, *e.g.*, *United States* v. *Hudson*, 129 F.3d 994, 995 (8th Cir. 1997) ("[W]hen the defendant makes a timely objection to the PSR, '[i]f the sentencing court chooses to make a

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989, the Tenth Circuit took an approach more like that of the Fifth Circuit. There, because the defendant had objected without any evidence to support the objection, the court of appeals concluded that the district court did not commit clear error in adopting the finding in the PSR. *Ibid.* In *Gessa*, the Sixth Circuit did not discuss whether a hearing or production of evidence is required in order to overrule a defendant's objection to a finding in the PSR; in that case, the district court had sustained the defendant's objection. 971 F.2d at 1265 n.7. Finally, *Dorman* involved a probation officer's absolute immunity from suit for preparation of an inaccurate PSR. The Second Circuit did not address the district court's adoption of findings in the PSR, but simply stated that a court cannot rely on a controverted statement in the PSR unless it has found the statement to be accurate by a preponderance of the evidence. 821 F.2d at 138. Similarly, in the other Second Circuit case petitioner cites (Pet. 10 n.2), the court simply stated that the preponderance of the evidence standard applies to findings at sentencing. See *United States* v. *Lee*, 818 F.2d 1052, 1056-1057 (2d Cir.), cert. denied, 484 U.S. 956 (1987).

[6] By contrast, in *Yates*, 22 F.3d at 989, although the defendant objected to the information contained in the PSR, the Tenth Circuit upheld the PSR's findings, because the defendant "failed to present any evidence whatsoever to contradict" the PSR. Here, as in *Yates*, petitioner challenged the factual findings in the PSR without proffering any evidence that supported his challenge.

finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report.'") (quoting *United States* v. *Burke*, 80 F.3d 314, 316 (8th Cir. 1996)). Although there is some tension between that approach and the standard employed by the Fifth Circuit, it is far from clear that petitioner would have prevailed under the Eighth Circuit's approach. Petitioner offered no evidence to support his contention that he was not responsible for the quantity of methamphetamine attributed to him in the PSR; he did not offer to produce such evidence; he did not ask for a hearing; and, as explained below (see pp. 14-16, *infra*), his objections to the PSR were wholly insubstantial. As a result, the district court had before it only the uncontroverted PSR. Under those circumstances, the result in this case likely would have been the same, even if it has arisen in the Eighth Circuit. See *United States* v. *Wise*, 976 F.2d 393, 403 (8th Cir. 1992) (en banc) ("The determination of whether hearsay is sufficiently reliable to warrant credence for sentencing purposes necessarily depends upon the particular circumstances of each case."), cert. denied, 507 U.S. 989 (1993).

Indeed, petitioner's objections to the PSR were not sufficient to warrant a hearing, regardless of the applicable standard. With respect to the quantity of drugs involved, petitioner does not object to the district court's reliance on the six-pound delivery of methamphetamine made to petitioner on or about April 4, 1995.[7]

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[7] To the contrary, petitioner repeatedly has acknowledged that the informant's information regarding the April 4, 1995, delivery was corroborated by other evidence. Defendant's Objections at 1 (acknowledging that the surveillance of defendant and two other men corroborated this information); 4/6/98 Sent. Tr. 3 ("I could understand how the Court could find that there would be some

Nor does he contend, before this Court, that it was error to include the 2.2 kilograms he left on the curb on April 14, 1997.[8] Instead, petitioner devotes his efforts (Pet. 5-6, 8) to disputing the PSR's finding that he received a second six-pound delivery on or about April 19, 1995. That second six-pound delivery, however, had no effect on petitioner's base offense level. Instead, the six pounds received on April 1, 1995, and the 2.2 kilos he abandoned on April 14, 1997, were more than sufficient to establish a base offense level of 34. See p. 5, note 1, *supra*. Thus, even if the district court erred in failing *sua sponte* to take evidence on this matter, that error had no effect on petitioner's sentence.

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substantiating evidence as to six pounds."); Pet. C.A. Br. 13 (failing to challenge district court's finding regarding these drugs); PSR ¶¶ 13, 14, 17, 22 (describing corroborating evidence).

[8] In the court below, petitioner did claim that the 2.2 kilograms left at the curb could not be attributed to him. He did not deny, however, that he carried a box from a residence to a Ford Explorer; that he left in the Ford Explorer; that an identical box was left on the curb; or that, when he was stopped moments later, he did not have the box he had been carrying and could not explain where the box had gone. Instead, before the district court, petitioner argued that the drugs found in the box could not be attributed to him because (1) no one saw him drop the box on the curb; (2) he was not arrested or charged with a possession offense; and (3) the conduct was not within the "parameters" of the conspiracy alleged in the indictment. Defendant's Objections at 1-2. All three of those objections could be resolved by the district court without taking additional testimony, because all three raise legal rather than factual disputes. The first disputes whether the circumstantial evidence of petitioner's involvement with the box was sufficient given the absence of an eyewitness who actually saw him leave the box on the curb (it was); and the other two dispute whether the conduct legally could be considered at sentencing (it can).

Petitioner's objections to inclusion of the April 19, 1995, six-pound delivery, moreover, were not well founded. Petitioner claimed that the confidential informant's statements regarding that delivery were uncorroborated. That claim, however, was refuted by the PSR. See p. 6, *supra*. Moreover, petitioner's sole basis for casting doubt on the informant's credibility was the fact that the informant reported the April 19, 1995, delivery to the police on the very day the delivery was made. Pet. 5-6. As the district court observed at sentencing, the fact that the informant told the police about the drugs on the same day petitioner received them did not render his credibility "suspect," because it is reasonable to presume that the drugs had arrived earlier that day. 4/6/98 Sent. Tr. 5.

Finally, petitioner claims that he was not a "manager" or "supervisor" of the drug conspiracy. But that claim did not warrant a hearing either. The PSR is replete with specific information indicating that petitioner had directed members of his family and other coconspirators in the distribution of drugs. See PSR ¶ 7, 9, 11, 12, 14, 15, 18, 20, 26. Faced with that evidence, petitioner did not deny that he instructed others throughout the conspiracy. Instead, he attempted to distinguish between "giving orders as his part in a hierarchy" and simply "telling someone who he knew to run some errand for him." Defendant's Objections at 2. The district court could resolve the validity of such a distinction without hearing the abundant evidence of petitioner's aggravated role. Because none of petitioner's objections raised any ground to believe that an evidentiary hearing was called for, the district court did not abuse its discretion in declining to call for one *sua sponte*, and petitioner's sentence would have been

properly affirmed regardless of the circuit in which his case arose.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
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DECEMBER 2000

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[9] Petitioner pleaded guilty to Count One, which charged a conspiracy to distribute heroin and methamphetamine. Gov't C.A. Br. 2. See 12/15/97 Sent. Tr. 6-7, 12-14. The judgment filed on April 13, 1998, however, indicates that he was convicted of a "conspiracy to possess w/intent to distribute more than 1 kilogram of heroin." Pet. App. 3. Citing that error (Pet. 12 n.3), petitioner suggests that he was not properly subject to a 20-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A). See PSR ¶ 59. Because petitioner's proper Sentencing Guidelines range exceeded 20 years without reference to the mandatory minimum, there is no need to resolve that question here.